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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), allows a partial new trial limited solely to the issue of punitive damages.

PARTIES TO THE PROCEEDING

The following are the parties to the proceedings in the District of Columbia Court of Appeals:

Defendants/Appellants:

The Jonathan Woodner Company
The Estate of Jonathan Woodner
Steven Z. Laufer

Plaintiffs/Appellees:

Margaret Adams
Francisca Breeden
Muriel Cardenas
Lydia Headecker
Elise Joyner*
Archie J. McCallum
Stanley Poindexter
Winslow Spady
Clarece Walker Thame*

Pursuant to Supreme Court Rule 29.6, petitioner The Jonathan Woodner Company states that its parent company is the Shipley Corporation and that it has no non-wholly owned subsidiaries.

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* The claims of Ms. Joyner and Ms. Thame were settled during the proceedings in the Court of Appeals and these individuals are therefore not parties to the proceedings in this Court.

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THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

The Jonathan Woodner Company, the Estate of Jonathan Woodner, and Steven Z. Laufer petition this Court for a writ of certiorari to review the order of the District of Columbia Court of Appeals entered August 8, 1996.

OPINIONS BELOW

The order of the Court of Appeals authorizing a partial new trial limited to punitive damages and execution on a partial judgment for compensatory damages is reported at 681 A.2d 1098 and is reproduced in the appendix to this petition ("App.") at 1a. The order of the Court of Appeals denying rehearing and rehearing en banc of that order is unreported and is reproduced at App. 8a. The prior opinion of the Court of Appeals affirming the trial court's judgment in part and reversing in part is reported

at 665 A.2d 929 and is reproduced at page 1a of the appendix to the petition for a writ of certiorari in No. 96-821, filed November 22, 1996. The order of the Court of Appeals granting panel rehearing of that judgment in part and denying rehearing en banc is reported at 681 A.2d 1097 and is reproduced at page 62a of the appendix to the petition in No. 96-821.

JURISDICTION

The order of the Court of Appeals authorizing a partial new trial limited to punitive damages and execution on a partial judgment for compensatory damages was entered on August 8, 1996. That court's order denying panel rehearing and rehearing en banc of the August 8, 1996 order was issued on December 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This petition presents the question of whether the Seventh Amendment to the United States Constitution permits a partial new trial limited solely to the question of punitive damages. The court below—in conflict with the governing decision of this Court and the decisions of the vast majority of courts to have considered the issue—authorized such a partial new trial.[1] As

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[1] Petitioners have already filed a petition for certiorari (No. 96-821) seeking review of an earlier decision of the Court of Appeals in this case that approved an award of compensatory

explained below, the conflict among the lower courts over the question, and the importance of the issue to the fair assessment of punitive awards, warrants this Court's review.

The background to the dispute in this case is set forth more fully in our earlier pending petition, No. 96-821. Respondents (plaintiffs in the trial court) are former tenants in an apartment building in the District of Columbia and petitioners (defendants in the trial court) are the managers of the building. Respondents sued petitioners on a variety of tort theories predicated on the conditions in the building; the trial court entered a single judgment against petitioners for compensatory and punitive damages; and petitioners took a single appeal to the Court of Appeals. The Court of Appeals then issued two separate decisions, each of which warrants this Court's review. But because the court issued these rulings at different times, and separately denied petitions seeking rehearing of them, petitioners were required to file two petitions for certiorari in order to ensure that both rulings were properly and timely before this Court.

In its first decision, issued on September 14, 1995, the Court of Appeals affirmed the trial court's judgment with respect to certain awards of compensatory damages, but reversed the judgment with respect to the awards of punitive damages and remanded for a new trial. The Court of Appeals denied petitions for rehearing of that decision on July 25, 1996. Accordingly, on November 22, 1996, petitioners filed a petition for a writ of certiorari, docketed as No. 96-821, seeking review of the September 14, 1995 decision.[2] As explained in that

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damages. Petitioners request that that petition be considered together with the present one. Petitioners submit that whether the two petitions are considered separately or together, certiorari is plainly warranted in this case.

[2] On October 14, 1996, Chief Justice Rehnquist extended until November 22 the time for petitioners to seek review of the September 14, 1995 decision.

petition, that decision raises an important issue, upon which the lower courts are deeply divided, relating to the proper application of this Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

The present petition arises because the Court of Appeals' denial of rehearing of the September 14, 1995 judgment did not mark the end of its consideration of this appeal. While the petitions for rehearing were pending, respondents had filed with the Court of Appeals a "Motion for Issuance of Mandate to Permit Execution on Judgment for Compensatory Damages." In that motion, respondents requested that the court certify the trial court's compensatory-damages verdict as a final, executable judgment, notwithstanding that the court had reversed the award of punitive damages and remanded for a new trial.

On August 8, 1996, the Court of Appeals, in a published order, granted the relief sought by respondents over the dissent of one judge. *See* App. 1a & n.*. In so doing, the court rejected two contentions that petitioners had raised. First, the court held that Fed. R. Civ. P. 54(b) (as incorporated by the identical District of Columbia rule), permits the issuance of a final, executable judgment for compensatory damages even though a request for punitive damages remains outstanding. App. 3a-4a. Second, the court rejected petitioners' contention that issuance of a partial final judgment on compensatory damages would contravene this Court's decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), which holds that where the evidence relating to a plaintiff's requests for punitive and compensatory damages is overlapping or intertwined, the defendant has a Seventh Amendment right to a new trial on both issues. App. 4a-7a.[3]

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[3] The Court of Appeals noted that this issue ordinarily would be decided by the trial court on remand, but the court held that it would decide the issue *de novo* in view of the circumstances of this case. App. 5a-6a.

The Court of Appeals rejected both contentions and authorized execution on plaintiffs' compensatory damages award following issuance of the mandate. On August 22, 1996, petitioners filed a timely petition seeking rehearing or rehearing en banc of that ruling. On December 4, 1996, the Court of Appeals denied that petition over the dissent of one judge (*see* App. 8a), thereby rendering the August 8 decision ripe for this Court's review. *See* Supreme Court Rule 13.3. Petitioners now seek review of both the August 8, 1996 and the September 14, 1995 decisions, both of which raise important questions of federal law and both of which are in conflict with decisions of other lower courts.[4]

REASONS FOR GRANTING THE WRIT

By holding that the Seventh Amendment permits a partial retrial limited to the question of punitive damages, the Court of Appeals placed itself in conflict with this Court's governing decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and with the vast majority of lower courts that have ruled on the issue. The issue is an important and recurring one, and one whose resolution is critical to the fair assessment of punitive awards in this country. The petition should therefore be granted.

I. THE COURT OF APPEALS' DECISION PERMITTING A PARTIAL RETRIAL LIMITED TO PUNITIVE DAMAGES CONFLICTS WITH THIS COURT'S DECISION IN *GASOLINE PRODUCTS* AND WITH THE DECISIONS OF NUMEROUS OTHER FEDERAL COURTS

In *Gasoline Products*, this Court held that under the Seventh Amendment a partial new trial limited to a particular issue "may not properly be resorted to unless

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[4] Pursuant to the Court of Appeals' procedural rules, the mandate with regard to both the September 14, 1995 and August 8, 1996 decisions has been stayed pending resolution of the petitions for certiorari filed with this Court. *See* D.C. Ct. App. R. 41(b).

it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500.[5] In that case, the lower court had found error in the jury instructions relating to damages on a particular claim and had ordered a partial retrial on damages alone. This Court reversed, ordering a new trial on all issues relating to that claim because the question of damages was "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500-01.

In this case, the Court of Appeals reversed the jury's award of punitive damages, but ordered a partial new trial limited solely to that issue. The court (relying on a prior opinion of its own that had interpreted *Gasoline Products*) rejected petitioners' contention that they had a Seventh Amendment right to demand a retrial on all issues relating to respondents' claims.[6] Although the court recognized that "some of the evidence previously presented to establish liability will also be relevant to the punitive damages claim," it nevertheless held that "the liability and compensatory damages issues on one hand, and punitive damages issues, on the other, are discrete and that a trial on punitive damages alone will be unaffected by our affirmance of the compensatory damage awards and the collection by the tenants of the sums awarded." App. 6a (relying on *Robinson* v. *Sarisky*, 535 A.2d 901, 908 (D.C. 1988)).

This ruling is in direct conflict with this Court's decision in *Gasoline Products*. In that case, the Court

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[5] As the Court noted, prior to the adoption of the Seventh Amendment, the common law did not allow partial retrials *at all*. *Id.* at 497-98.

[6] The Seventh Amendment is fully applicable to the local District of Columbia courts. *Pernell* v. *Southall Realty*, 416 U.S. 363, 370 (1974).

held that the question of damages could not be retried separately because much of the evidence required to prove damages was also necessary to prove liability. 283 U.S. at 499, 500. In this case—contrary to the Court of Appeals' statement that petitioners had "asserted no way in which the [questions of punitive and compensatory damages] are interwoven here," App. 6a—there is no question that the evidence necessary to prove respondents' purported entitlement to punitive damages is the *same* evidence necessary to prove liability for compensatory damages. Indeed, at the original trial of this case, respondents introduced *no* new evidence on the question of petitioners' liability for punitive damages, but instead relied solely on their evidence on their underlying claim for intentional infliction of emotional distress.[7]

In *Gasoline Products*, the Court required a new trial on all issues because the damages question could not be resolved without reference to issues considered by the first jury but it was impossible to discern from the verdict the jury's resolution of those issues. *See* 283 U.S. at 499. So too here. Respondents alleged a number of purported incidents in support of their claim of intentional infliction of emotional distress, and those allegations would also be relevant to their request for punitive damages. But it is impossible to discern from the verdict which of petitioners' evidence the jury credited and which it did not. Thus, as in *Gasoline Products*, the issue of liability for compensatory damages is so "interwoven" with the issue of punitive damages that petitioners have a Seventh Amendment right to a new trial on all issues before the same jury.

Given this Court's holding in *Gasoline Products*, and the inseparable relationship between the questions of liability and compensatory damages on the one hand,

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[7] The trial was bifurcated, with the question of punitive damages tried separately—to the same jury—following a trial on the questions of liability and compensatory damages.

and punitive damages on the other, it is not surprising that the overwhelming majority of lower courts to have addressed the issue—including the Third, Fourth, Fifth, Eighth, Ninth and Tenth circuits—have held as a matter of law that the Seventh Amendment entitles parties such as petitioners to insist that the same jury hear both issues.[8]

The reasoning employed by these courts is in direct conflict with the reasoning of the Court of Appeals in this case. For example, in *Mason* v. *Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992), the Tenth Circuit explained that:

> A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff's case. It is part and parcel of the liability determination and does not have any independent being until a jury has decided, based on the preponderance of the evidence, that not only was a defendant's conduct negligent, but that it was gross, willful, wanton or malicious. Proof of gross, willful, wanton or malicious conduct by a defendant *is not separate from proof of a defendant's negligence*. The evidence proving negligence establishes liability and the

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[8] *See Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1552-54, 1561 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *Spence* v. *Board of Education of the Christina School District*, 806 F.2d 1198, 1202 (3d Cir. 1986); *Lanier* v. *Sallas*, 777 F.2d 321, 325 (5th Cir. 1985); *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1388-89 (8th Cir. 1983), *cert. denied*, 469 U.S. 870 (1984); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302, 306 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961); *Atlantic Coast Line R.R.* v. *Bennett*, 251 F.2d 934, 939 (4th Cir. 1958); *see also Burke* v. *Deere & Co.*, 6 F.3d 497, 513-14 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1178 (10th Cir. 1981) (en banc), *cert. denied*, 464 U.S. 824 (1983); *Slater* v. *KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980); *Bankers Life & Casualty Co.* v. *C.M. Kirtley*, 307 F.2d 418, 426 (8th Cir. 1962); *Smyth Sales* v. *Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944).

> degree of negligence is determinative in the award of punitive damages.

Id. at 1554 (emphasis supplied).[9] *See also Lanier* v. *Sallas*, 777 F.2d 321, 325-26 (5th Cir. 1985) ("[T]he punitive-damage claim is dependent on establishing liability for compensatory damages and, in addition, establishing malice or some other aggravating circumstance. *It cannot be tried in isolation, and remand of that claim would necessitate retrial of the entire case*") (emphasis supplied); *Slater* v. *KFC Corp.*, 621 F.2d 932, 938 (8th Cir. 1980) (awarding new trial on all issues in part because "any award of punitive damages must turn on an assessment of [the defendant's] conduct").

These rulings also find support in recent decisions of this Court setting forth other constitutional constraints on punitive awards. *See BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589 (1996); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991). In these cases, the Court held that due process requires that juries and reviewing courts consider both the character and degree of a defendant's allegedly wrongful conduct before awarding or upholding punitive damages. *BMW*, 116 S. Ct. at 1598; *Haslip*,

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[9] In *Mason*, the court invoked the *Gasoline Products* rule twice. In that case, a jury had originally awarded compensatory damages but no punitive damages, and the Tenth Circuit reversed the compensatory award and remanded for a new trial. A second jury then returned an award of compensatory damages and a large award of punitive damages. On a second appeal, the Tenth Circuit held that because the issues of liability for compensatory and punitive damages are necessarily intertwined, the retrial was properly held on all issues even though the plaintiff had not cross-appealed the original denial of punitive damages. *Id.* at 1554. The court then reversed the second jury's award of punitive damages and allowed the plaintiff the option of accepting a remittitur of those damages. The court made clear, however, that if the plaintiff declined the remittitur, a second new trial was required on all issues. *Id.* at 1561.

499 U.S. at 19. Likewise, the Court has held that due process requires some relationship between the amount of a punitive award and the actual or potential damages caused by the defendant. *BMW*, 116 S. Ct. at 1598, 1601; *TXO*, 509 U.S. at 459-62; *Haslip*, 499 U.S. at 21, 23. These decisions confirm the central point being made here: that a jury's consideration of a request for punitive damages cannot be divorced from the evidence underlying the tort upon which the request is based.

Not only does the decision below conflict with *Gasoline Products* and with lower court opinions applying the rule in that case, but it is also fundamentally inconsistent with decisions from this and other courts interpreting Fed. R. Civ. P. 54(b). In *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976), this Court held that Rule 54(b) precludes entry of a final judgment on liability when the question of relief remains outstanding. Relying in part on that decision, the lower federal courts—with the sole exception of the Court of Appeals in this case—have held that Rule 54(b) prohibits the entry of a final, executable judgment for compensatory damages while the question of punitive damages remains outstanding, because a request for punitive damages cannot be separated from the rest of a plaintiffs' claim.[10] If, as these courts have held, a request for punitive damages is inseparable from the remainder of a plaintiff's claim under Rule 54(b), then it would be anomalous, to say the least, if such a request were nevertheless considered separable under the Seventh Amendment. *See Livesay* v. *Shollenbarger*, 19 F.3d 1443, 1994 WL 56923 at *3 (10th Cir. 1994)

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[10] *See Alonzi* v. *Budget Construction Co.*, 55 F.3d 331, 332 (7th Cir. 1995) (Posner, J.); *Arizona State Carpenters Pension Trust Fund* v. *Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991); *Sussex Drug Products* v. *Kanasco, Ltd.*, 920 F.2d 1150, 1154-55 (3d Cir. 1990); *see also General Acquisition, Inc.* v. *GenCorp, Inc.*, 23 F.3d 1022, 1028 (6th Cir. 1994) ("The fact that [plaintiff] seeks to recover two types of damages—compensation and disgorgement—does not convert a single claim into multiple claims").

(relying on *Mason*, *supra*, to hold that an order denying punitive damages was not separable claim under Rule 54(b) where liability and compensatory damages remained to be retried) (unpublished opinion).

Petitioners are aware of only one other appellate decision authorizing a partial retrial limited to punitive damages under the *Gasoline Products* rule. In *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988), the Second Circuit reversed an award of punitive damages as excessive but ordered a partial retrial limited to the amount of such damages. *Id.* at 375. That decision is in direct conflict with numerous other circuit court decisions (*see supra* n. 8), and petitioners believe that it contravenes *Gasoline Products*, particularly in light of this Court's recent decisions (*see supra* at 9-10) making clear that the question of the proper amount of punitive damages necessarily requires consideration of the evidence relating to the underlying tort. It should be noted, however, that the sole question in *Smith*—the proper *amount* of punitive damages—is less intertwined with the underlying claim than the questions to be retried in this case. Here, a second jury must decide whether the defendants' conduct justifies an award punitive damages *at all*, which will require it to consider the very same evidence as that supporting the underlying claim for intentional infliction of emotional distress.

In sum, the meaning of the Seventh Amendment presently varies by jurisdiction as it applies to the recurring question presented. In most jurisdictions, parties have a Seventh Amendment right to a new trial on all issues when an award of punitive damages is reversed and remanded. In a small minority, including the local courts of the District of Columbia, parties have no such right. This Court should resolve this conflict and ensure that the Seventh Amendment is applied uniformly throughout the federal court system.

II. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE THAT SHOULD BE RESOLVED BY THIS COURT

Given the increasing number and size of punitive damages awards rendered by juries throughout the Nation, and the increasing scrutiny accorded to those awards by this and other appellate courts, there is an acute need for guidance from this Court on the proper procedures to be employed upon reversal of a punitive award and remand for a new trial. Indeed, this Court's Due Process requirements respecting punitive damages would be undercut if those requirements mandated a new trial, but the new trial were itself completely unfair and in violation of the Seventh Amendment. Accordingly, both Due Process *and* the Seventh Amendment must be scrupulously and uniformly applied in the lower courts in order to ensure that punitive damages are fairly awarded. This Court has already addressed the Due Process requirements of such awards. It should now address the Seventh Amendment requirements.

This is particularly so given that, as shown by the large and conflicting number of reported decisions addressing the Seventh Amendment requirements, the content of those requirements is a constantly recurring question in the lower courts. And the question is bound to recur even more frequently if not resolved by this Court. It is well-known that "[r]ecent years . . . have witnessed an explosion in the frequency and size of punitive damages awards." *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (citing RAND Institute for Civil Justice, M. Peterson, S. Sarma & M. Shanley, *Punitive Damages—Empirical Findings* iii (1987)). At the same time, this Court has increasingly stressed that trial and appellate courts must rigorously scrutinize punitive awards to ensure that they comport with constitutional and other legal requirements. *See, e.g.*, *BMW*, *supra*; *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994); *TXO*, *supra*; *Haslip*, *supra*. Indeed, in *Honda* the Court held that the

Constitution mandates adequate appellate procedures for scrutinizing punitive damages awards.

This combination of factors—increasing numbers of punitive awards and increasing appellate scrutiny of those awards—will necessarily lead to more instances like the present case in which courts must determine the proper procedure to be followed upon reversal of a punitive award and remand for a new trial. Indeed, the Court recently recognized that, according to the most exhaustive study of punitive damages undertaken, more than half of punitive damages awards were appealed and in more than 10 percent of those cases, the court found the awards to be excessive. *Honda*, 512 U.S. at 433-34 n.11 (citing Rustad, *In Defense of Punitive Damages in Product Liability: Testing Tort Anecdotes With Empirical Data*, 78 Iowa L. Rev. 1, 57 (1992)). Accordingly, lower courts reviewing awards of punitive damages will increasingly be required to decide whether the Constitution permits a partial retrial on that question. Given the large number of decisions on this issue to date, the irreconcilable conflict among the lower courts, and the importance of the issue to the fair assessment of punitive awards, there is no cause for this Court to delay resolution of the conflict any longer.

Finally, the present case is a particularly appropriate vehicle for addressing the question presented. As described in our earlier petition, respondents' counsel, after creating an all-black jury to hear a case brought by black plaintiffs against white defendants, proceeded to inflame the passions of the jury by leveling unfounded accusations of racism against petitioners. The result was an enormous punitive damages award that the Court of Appeals reversed as unsupported by the evidence. The Court of Appeals, however, then permitted respondents to retry separately the issue of punitive damages before a new jury. If this ruling is not reviewed by this Court, the new jury will effectively be told that the evidence they are about to hear has already been determined sufficient

to prove the underlying tort—intentional infliction of emotional distress—even though the jury will not know which evidence the first jury credited and which it did not. It is submitted that such a prejudicing of the second jury is precisely what the Seventh Amendment and *Gasoline Products* prohibit. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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